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No. 04-169

In the Supreme Court of the United States

GRAHAM COUNTY SOIL &
WATER CONSERVATION DISTRICT, ET AL.,
Petitioners,

v.

UNITED STATES EX REL. KAREN T. WILSON,

Respondent.

On Writ of Certiorari to
the United States Court of Appeals
for the Fourth Circuit

BRIEF OF NATIONAL WORKRIGHTS INSTITUTE *AMICUS CURIAE* SUPPORTING NEITHER PARTY

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QUESTION PRESENTED

Whether the six year limitation period set out in 31 U.S.C. § 3731(b) should be applied to retaliatory discharge actions under the False Claims Act or whether courts should apply the most closely analogous state limitation period?

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INTEREST OF AMICUS CURIAE

The National Workrights Institute ("NWI") respectfully submits this brief in accordance with Supreme Court Rule 37.3.[1] NWI is a nonprofit organization formed in January 2000 with a mission to be the one major human rights organization that commits its entire effort to workplace issues. NWI's stated goal is to improve the legal protection of human rights in the workplace, and NWI has engaged in a wide variety of activities designed to expand those rights. In connection with its public education efforts, NWI's staff has appeared more than 2,000 times in both the print and electronic media, and NWI and its predecessor entity[2] also have promoted laws designed, among other things, to prohibit employers from penalizing private employee behavior that does not affect job performance, to limit employers' electronic surveillance of employees, to ban workplace genetic

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[1] The parties consented to the filing of this brief, and copies of the parties' written consents are being filed with the Clerk of the Court. This brief was not authored in any part by counsel for either party, and no person or entity other than *amicus curiae*, its members, and counsel made a monetary contribution toward the preparation or submission of this brief.

[2] The original National Workrights Institute was founded in 1988 by the American Civil Liberties Union ("ACLU"). NWI was founded in January 2000 by former staff of the ACLU's National Taskforce on Civil Liberties in the Workplace. NWI is an independent 501(c)(3) organization, and is no longer affiliated with the ACLU, which is not a party to this *amicus curiae* brief. Additional information on the mission and goals of NWI may be found on its website. *See* http://www.workrights.org.

discrimination, to limit indiscriminate drug testing, to provide workers with due process rights in employment arbitrations, and to promote workers' rights to organize.

SUMMARY OF ARGUMENT

NWI takes no position on which party should prevail on the merits of this case. NWI files this brief as *amicus curiae*, however, to encourage this Court to adopt a new legal paradigm when interpreting statutes of limitations. The legal protection of human rights in the workplace will be enhanced overall by having statutes of limitations construed in a manner that promotes their underlying core principles, including conceptual reasonableness, fairness, predictability, and a positive practical impact.

ARGUMENT

In *United States ex rel. Wilson v. Graham County Soil & Water Conservation District*, 367 F.3d 245 (4th Cir. 2004), the court of appeals held that the statute of limitations applicable to anti-retaliation claims brought under 31 U.S.C. § 3730(h) of the False Claims Act ("FCA") is the six-year limitations period set forth in 31 U.S.C. § 3731(b)(1), which accrues on the date of the underlying false claim, rather than the most analogous state statute of limitations, which would begin to run on the date of the retaliatory act. In reaching this decision, the court of appeals "introduce[d] an unprecedented oddity into state and federal law by disconnecting the statute of limitations for anti-retaliation claims from the actual retaliatory acts themselves." *Id.* at 257 (Wilkinson, J., dissenting).

By decoupling the claim from the injury, the court of appeals unnecessarily created uncertainty in workers' legal rights, even raising the prospect of a limitations period expiring before a cause of action for retaliation accrues. In deciding whether to adopt this interpretation, NWI encourages this Court to move toward a judicial construct in which the Court will henceforth evaluate statutes of limitations in a manner that promotes their underlying purposes. The language of § 3731(b) does not foreclose this type of analysis in the instant case, and NWI urges this Court to engage in such an evaluation here.

I. Section 3731(b)(1)'s Federal Statute of Limitations Does Not Plainly Cover Anti-Retaliation Claims Under the FCA

The FCA anti-retaliation statute, 31 U.S.C. § 3730(h), does not itself contain a statute of limitations. The court of appeals, however, ruled that Congress had supplied one through the operation of 31 U.S.C. § 3731(b)'s plain language. Section 3731(b) provides a six-year statute of limitations for a "civil action under section 3730." The court of appeals held that this clause necessarily includes a civil action filed under § 3730(h). As Judge Wilkinson's dissent and a unanimous panel of the Ninth Circuit both note, however, "[t]he answer is not so simple." *Wilson*, 367 F.3d at 358 (Wilkinson, J., dissenting); *United States ex rel. Lujan v. Hughes Aircraft Co.*, 162 F.3d 1027, 1034 (9th Cir. 1998). In fact, "the majority's purported plain language interpretation lops off half the statute." *See Wilson*, 367 F.3d at 358 (Wilkinson, J., dissenting)). Section 3731(b) goes on to state that applicable claims

are barred "6 years after the date on which the violation of section 3729 is committed." The reference to a "violation of section 3729" shows that Congress intended the six-year limitations period in § 3731(b)(1) to apply only to claims under § 3730 that arise from a violation of § 3729 (*i.e.*, actions by the Attorney General under § 3730(a) and *qui tam* actions by individuals under § 3730(b)). "Section 3729 specifically and strictly addresses false claims, not retaliation claims." *Lujan*, 162 F.3d at 1035. Viewed as a whole, then, § 3731(b)(1)'s applicability to § 3730(h) anti-retaliation claims is far from "plain." As noted by Judge Wilkinson, "an employer may wrongfully retaliate against a whistle-blowing employee even in the absence of section 3729 violations." *Wilson*, 367 F.3d at 258 (Wilkinson, J., dissenting). *See also United States ex rel. Ackley v. IBM*, 110 F. Supp. 2d 395, 402 (D. Md. 2000) (employee "could be retaliated against even if false claims were never actually made or not proven or if the timing of their occurrence were indeterminate.").

Perhaps recognizing this problem, and striving to avoid an interpretation of the statute in this situation that could "leave this statute of limitations without a starting point," *Wilson*, 367 F.3d at 258 (Wilkinson, J., dissenting), the court of appeals notes that "an action under § 3730 will not lie absent an *alleged* violation of § 3729." *Wilson*, 367 F.3d at 251 (emphasis added). This word "alleged," however, is nowhere found in § 3731(b)(1). The court of appeals thus essentially rewrites the statute to avoid a conclusion that the law cannot reasonably support – one in which a mere statute of limitations would change the scope of the substantive

law, by limiting anti-retaliation claims to situations where actual violations of § 3729 are established – nullifying the broader, express terms of § 3730(h) itself. *See* 31 U.S.C. § 3730(h) (barring retaliation linked to any "lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, or assistance in an action filed or to be filed under this section").[3] That the court of appeals finds it necessary to add this absent word to the statute to try to support its interpretation – despite the statute's supposed plain meaning – only clarifies that Congress' intent to have § 3731(b) cover anti-retaliation claims is anything but plain.

As Judge Wilkinson notes, the court of appeals' suggestion of plain meaning also fails to account for a legislative change in the law. The pre-1986 version of § 3731(b) stated that § 3730 actions must be filed "within 6 years from the date the violation is committed." Section 3730(h)'s anti-retaliation claim was added in 1986. At the same time, "Congress narrowed the applicability of the statute of limitations to 'violations of section 3729,'" making clear that § 3731(b) only governed claims arising from violations of section 3729. *Wilson*, 367 F.3d at 259 (Wilkinson, J., dissenting). The court of appeals' ruling thus "suggests

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[3] Elsewhere, the court of appeals inconsistently suggests that the limitations period for FCA anti-retaliation claims will begin to run "when the violation of § 3729, to which such violations of 3730(h) must be tethered, is *found* to *have occurred*." 367 F.3d at 251 (emphasis added). The majority never attempts to explain, however, how this narrowed view of § 3730(h)'s scope can be reconciled with the broader language of § 3730(h) itself.

that this statutory change is meaningless and contravenes the well-established rule that '[w]hen Congress alters the wording of a statute, we must presume Congress intended a change in the law.'" *Id.* (Wilkinson, J., dissenting) (citations omitted).

At a minimum, it cannot unambiguously be said that Congress created an express federal statute of limitations for FCA anti-retaliation claims that "is at odds with all statutes of limitations for wrongful discharge, which commence with the occurrence of the retaliatory act." *Id.* at 260 (Wilkinson, J., dissenting). Even Respondent concedes "it seems likely that Congress drafted the statute carelessly, and never considered what limitations period might apply to the new cause of action for retaliatory discharge." Brief in Opposition to Petition for a Writ of Certiorari, 2004 WL 2678646, at *11 (suggesting a "mistake"). *Cf. United States v. Granderson*, 511 U.S. 39, 52-53 (1994) (finding ambiguity after noting how it appeared Congress may have been acting under a mistaken understanding of the law). A conclusion that Congress did not enact a statute of limitations expressly designed to cover FCA anti-retaliation claims can credibly be presented as the "interpretation which can most fairly be said to be imbedded in the statute, in the sense of being harmonious with its scheme and with the general purposes that Congress intended." *Commissioner v. Engle*, 464 U.S. 206, 217 (1984). Moreover, even if the language of § 3731(b) were more plain in its coverage of FCA anti-retaliation claims, this Court could still evaluate the factors NWI suggests below, on the theory that the court of appeals' "literal application would frustrate the statute's purpose or lead to an absurd

result." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). *See also Public Citizen v. United States Department of Justice*, 491 U.S. 440, 454-55 (1989) (court should not enforce plain meaning of a statute if it would lead to an absurd or odd result);[4] *Church of Holy Trinity v. United States*, 143 U.S. 457 (1892) (seminal case adopting this canon of statutory construction).

II. This Court Should Adopt a Legal Framework Designed to Foster The Underlying Goals of Statutes of Limitations Generally

If this Court determines that § 3731(b)(1)'s language does not compel a particular conclusion, as NWI suggests, it should then turn to a consideration of the nature of statutes of limitations generally. In this regard, NWI submits that any interpretation of statutes of limitations necessarily should include a review for certain core objectives, so that each statute of limitations will promote (1) conceptual reasonableness, (2) fairness, (3) predictability, and (4) a positive practical impact.

A. Statutes of Limitations Should be Conceptually Reasonable

The underlying concept of a statute of limitations is that a plaintiff has only a limited amount of time to file

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[4] While the opinions in *Public Citizen* may suggest a difference between "absurd" and "odd" results produced by a statute's plain meaning, this Court has not clearly articulated the distinction, and lower courts appear to use the terms interchangeably. *See, e.g., Hercules, Inc. v. EPA*, 938 F.2d 276, 281 (D.C. Cir. 1991) (plain meaning should not be applied if it would produce an *odd* result).

a claim. This principle necessarily dictates that the statute should start to run on the date when the plaintiff could first file his or her claim. Having a statute of limitations run from any other date is conceptually illogical.

In evaluating this factor, this Court will necessarily need to address what Judge Wilkinson noted below, and what no one denies: that the court of appeals' interpretation of § 3731(b) raises the prospect of what perhaps can be described as the ultimate absurdity in the law of limitations, in which a statute "may preclude challenges to retaliatory acts under section 3730(h) before that cause of action has even accrued." *Wilson*, 367 F.3d at 257 (Wilkinson, J., dissenting). *See id.* at 260 ("[T]he idea that a statute of limitations could expire even before the cause of action comes into being is not one that we should jump to conclude that Congress intended to embrace."). *See also United States ex rel. Truong v. Northrop Corp.*, 1991 WL 496831, at *2 (C.D. Cal. 1991) ("Congress cannot have meant for an employee's private claim against an employer to be time-barred *before* that employee suffers the retaliation") (emphasis in original). Indeed, from this "conceptual" perspective, even some lower courts in accord with the court of appeals' decision nevertheless concede that "[t]here may be circumstances in which application of the Congressionally-prescribed limitation periods contained in 31 U.S.C. § 3731(b) would engender uniquely harsh, unfair, or even 'absurd' results." *Storey v. Patient First Corp.*, 207 F. Supp. 2d 431, 446 (E.D. Va. 2002).

The court of appeals resisted characterizing these results as absurd, and this Court should carefully

consider and evaluate those arguments. In this regard, however, "the majority states that Congress was, in effect, enacting a statute of repose." *Wilson*, 367 F.3d at 259 (Wilkinson, J., dissenting). Viewed from a "conceptual" perspective, there can be no doubt that "[s]ection 3731(b) is self-evidently a statute of limitations." *Id.* (Wilkinson, J., dissenting). The majority's odd attempt to blend these concepts seems striking in a decision that purports to rely on "plain" language. The court of appeals' suggestion that a statute of limitations can be upheld as reasonable if it simply has the same effect as a statute of repose defies clear legal distinctions in the two concepts. Repose examines only the perspective of an employer, whereas a statute of limitations also focuses on the employee, and the date on which fair notice of a claim was received. Combining the two could create a troubling precedent, potentially diminishing the human rights of these employees by excusing their lack of notice simply because an employer might gain repose. *Id.* at 257 (Wilkinson, J., dissenting) (court of appeals "fails to give employees adequate notice concerning when the statute of limitations begins").

B. Statutes of Limitations Should be Fair

NWI also submits that statutes of limitations should be construed in a manner that promotes fairness. In evaluating this factor, this Court again must necessarily consider, among other things, the fact that the court of appeals' holding may produce additional odd and potentially unfair scenarios. In a single company, for instance, one employee might be fired three years after a false claim, while another (perhaps even the successor

employee) is fired two years later. At least one court has suggested that "[i]t is both unreasonable and unfair for identically situated plaintiffs to be held to widely varying periods of limitation because the accrual date for the limitations period is unrelated to their claim." *Truong*, 1991 WL 496831, at *2.

In considering this "fairness" factor, this Court should consider the court of appeals' suggestion that, in appropriate circumstances, "the doctrines of equitable tolling or equitable estoppel may provide relief." *Wilson*, 367 F.3d at 253. At the same time, however, this Court must factor in the potential confusion such procedures may create for employers, *see id.* at 260-61 (Wilkinson, J., dissenting) (this suggestion "undermines the value of having a statute of limitations in the first place"). This Court must also consider whether equitable, case-specific doctrines such as equitable tolling or estoppel are adequate to protect the human rights of employees. The very purpose of limitations periods is to provide certainty with respect to potential claims, which benefits both employers and employees. Equitable doctrines such as those suggested by the court of appeals are designed for scenarios in which a limitations period has run, but there exist additional equitable reasons why a given claim should be deemed timely. This Court may decide that such doctrines were never designed to supplant statutes of limitations, as they are no substitute for the certainty of a statutory period. As noted above, an equitable doctrine is not a legal right at all, but merely a hope that a judge "may" exercise what Judge Wilkinson characterized as "unpredictable discretion." *Id.* at 261 (Wilkinson, J., dissenting).

This Court also should evaluate this equitable tolling doctrine from a practical perspective. The court of appeals explained that an employee might obtain such equitable relief by proving that a retaliation after the limitations period expired was "the consequence of a deliberate design by the employer." *Id.* at 254. On the other hand, the manner in which an employee is supposed to establish this difficult and additional burden is never explained. Such evidence would seem to require the records or testimony of others outside the employee's control. Before ever obtaining the right to compulsory process that might unearth such a smoking gun, an employee may face "[l]awyers [who] may be reluctant to take on late challenges to retaliatory actions if there is only a chance that judges will exercise equitable tolling powers to recognize them." *Id.* at 261 (Wilkinson, J., dissenting). Fired whistleblowers can face extreme feelings of powerlessness, and this Court should evaluate whether predicating their legal rights at that stage on a mere "hope" of judicial beneficence is sufficient.

In evaluating this "fairness" factor, however, the court of appeals is certainly correct that, if FCA whistleblowers must rely on analogous state limitations periods, many will face a limitations period far shorter than the six years available under the FCA. Some of the analogous state law statutes of limitations that might be found applicable to FCA claims in this context, such as the 180-day provisions that apparently exist in Texas and Ohio, *see Wilson*, 367 F.3d at 255 (citing statutes), appear unfairly truncated. The suggestion made in the Petition for a Writ of Certiorari, 2004 WL 1752183, at *15 & 20, that six years is inherently too long to give

an employee to file an anti-retaliation claim, is baseless.[5] It is true that that analogous state statutes of limitations are often used in connection with other federal anti-retaliation claims such as 42 U.S.C. § 1981 and ERISA § 510 (29 U.S.C. § 1140), *see, e.g., Carney v. American University*, 151 F.3d 1090, 1096 (D.C. Cir. 1998); *Byrd v. MacPapers, Inc.*, 961 F.2d 157, 159 (11th Cir. 1992). *See also Hamilton v. Spraying Systems, Inc.*, 2004 WL 2191330, at *7-8 (N.D. Ill. 2004) (rejecting as "fundamentally flawed" the idea that 42 U.S.C. § 2000e-5(e)(1) can be construed to run from the date of the protected employment activity, rather than the retaliatory act). Nevertheless, it is appropriate for this Court to take into account these sometimes dramatic reductions in the length of the limitations periods applicable to FCA anti-retaliation claims. While it is true that the court of appeals' decision would give some employees more time to file from the retaliatory act and others less, if this Court believes that far more whistleblowers would benefit than be harmed by the court of appeals' interpretation, that is a consideration this Court may properly weigh in evaluating this "fairness" factor.

C. Statutes of Limitations Should be Predictable

NWI also submits that statutes of limitations should be interpreted in a manner that promotes predictability.

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[5] This six-year length of time does not differ markedly from Illinois' five-year statute of limitations for wrongful discharges, which was discussed in *Neal v. Honeywell, Inc.*, 33 F.3d 860, 861-62 (7th Cir. 1994).

The court of appeals obviously considered this factor, adopting Judge Easterbrook's belief that it is "easier to determine the date of a false claim than to pin down the time of retaliatory acts," since "the claim is a document." *Wilson*, 367 F.3d at 251 (citing *Neal*, 33 F.3d at 865). This Court should give due consideration to the court of appeals' beliefs in this regard. It is certainly true that "arguments about retaliation [may] depend on oral exchanges and are subject to failure of memory as well as the risk of prevarication." *Id.* at 251 (citing *Neal*, 33 F.3d at 865). On the other hand, it also must be noted that this conclusion is based on a presupposition that the retaliation is easily linked to a particular false claim. Often, however, whistleblowers will report on a number of alleged false claims – sometimes even hundreds or thousands, potentially covering a period of many months or even years. In evaluating this factor, then, this Court should properly consider the broader concepts of predictability that inevitably may come into play: Which false claim will be the one to which retaliation against an employee is "tethered"? Can an employer openly admit FCA retaliation but then assert that the retaliation was based on the employee's disclosure of a false claim beyond the limitations window, rather than more recent false claims, thereby avoiding liability altogether? How would an employee go about "linking" the employer's retaliation to the disclosure of one particular false claim or set of claims instead of another? What will happen if a jury decides the retaliation was based on false claims that are both within and outside the limitations window – will the damages award be allocated and split? If so, how? What if the retaliation is clear but it is based (as

may typically be the case) on the general fact of disclosure to the government, with no real way to break down the issue further – is an employee out of luck? What if only the earlier claims beyond the six-year window are ultimately "found" to be false? Already, this view of § 3731(b) has led to a rather remarkable scenario in one court where, even after the filing of a complaint, neither side's counsel was able to tell the court when the statute of limitations expired. *See United States ex rel. Tillson v. Lockheed Martin Energy Systems, Inc.*, 2004 WL 2403114, at *16 (W.D. Ky. 2004) ("At the hearing, counsel for both parties indicated that the exact date of SAIC's alleged § 3729 violation on which Tillson's retaliation claim is based is not known at the present time."). Starting the limitations period for a retaliation claim at the point in time of the § 3729 violation may do little, if anything, to make it easier to determine the limitations period in particular cases. This Court should evaluate whether Congress intended, in § 3730(h) or elsewhere, to add these complexities to the anti-retaliation limitations equation, or to impose this burden on employee whistleblowers. *See* S. Rep. No. 99-345, at 1-2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5267 (Congressional intent in amending FCA included goal "to encourage any individual knowing of Government fraud to bring that information forward."). If § 3730(h) is best read as a statute designed to prevent retaliation against FCA whistleblowers generally, this Court may wish to carefully consider, in evaluating predictability, whether it is wise to create a process in which courts would be required to perform the difficult task of trying

to link and allocate retaliation to a particular underlying false claim.

On the other hand, an interpretation of the FCA that requires whistleblowers to utilize the most analogous state statute of limitation may create uncertainty and choice of law questions of its own, raising countervailing predictability issues. NWI submits that this Court should carefully weigh all of these various factors in reaching its ultimate conclusion.

D. Statutes of Limitations Should Have a Positive Practical Impact

Finally, NWI submits that statutes of limitations should be interpreted in a manner that promotes the underlying policy goals of the substantive laws to which they are being applied. In this case, this Court should consider whether the court of appeals' decision will enhance or undermine the FCA process itself. In this regard, this Court must necessarily consider whether employees will be progressively discouraged from coming forward with potentially important information to the government as the statute of limitations on the underlying false claim approaches. This is not an idle concern, for "the discovery of false claims, predicated on deceptive practices, may not occur until late in the day." *Id.* at 261 (Wilkinson, J., dissenting). A new employee who starts with a company and uncovers a fraud 4-5 years old, for example, would face a very real dilemma – with a risk of retaliation without recourse if he or she comes forward. *See Truong*, 1991 WL 496831, at *1 (noting this "rather bizarre" result). Or, even on earlier claims, "an employer, and especially one aware of the

majority's limitations rule, could resolve not to 'get mad,' but in the longer run to 'get even.'" *Wilson*, 367 F.3d at 261 (Wilkinson, J., dissenting). It would be wrong to assume that these intricacies of statute of limitations law will be unknown to such employees. Many of the most effective *qui tam* whistleblowers are well-educated corporate managers, and many if not most will likely approach attorneys trained in FCA law before becoming whistleblowers. Those lawyers necessarily will advise their clients of these risks. Under the court of appeals' decision, some employees may choose not to proceed, making it impossible to know how many frauds against the United States never see the light of day.[6] The fact that the court of appeals' decision may result in any number of acts of fraud going undetected is a factor that this Court should factor into its analysis.

The risks that an employee whistleblower often takes in this context should not be minimized. Often, employees with decades of service, sometimes all with

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[6] In her opposition to the petition for a writ of certiorari, Respondent emphasized how no published case had shown that any "absurd" results has yet occurred. Of course, we will never know about the cases that employees perhaps never filed due to concerns that they could not be protected from retaliation because their claims might be time-barred. In any event, the idea that a retaliation may occur long after false claims is far from fanciful. *See, e.g., Childree v. UAP/GA AG Chem, Inc.*, 92 F.3d 1140, 1143 (11th Cir. 1996) (false claims submitted in 1989, employee fired over four years later in 1993, suit filed later still; while the anti-retaliation lawsuit was pending, the plaintiff "concede[d] that the statute of limitations for bringing such a *qui tam* action has now run.").

the same company, place their entire careers on the line. They forever change the nature of their relationship with their employer and also risk the possibility of a broader "blackballing" within their industries at large, even if they leave their company. The court of appeals' suggestion that even a whistleblower who can establish open and willful retaliation by an employer nevertheless may have their claims denied as time-barred (or be left with the mere hope of an "equitable tolling" argument) would not seem to promote the underlying goals of the FCA. This Court should carefully consider whether this is what Congress intended when it expanded the scope of § 3730 to include claims of retaliation.

On the other hand, the Respondent or other *amici* may submit briefs that discuss ways in which the policy goals of the FCA would be enhanced by the court of appeals' decision. Again, NWI believes that all of these factors should also be carefully considered in this equation. At the present time, however, it is not obvious to NWI that Congress would save this special treatment, and this unusual construction of a statute of limitations, for employers "who first defrauded the government and then moved against the very persons who brought that fraud to light." *Id.* at 259 (Wilkinson, J., dissenting).

In sum, NWI asks this Court to adopt and carefully evaluate the four underlying core principles that it believes should underlie any evaluation of statutes of limitations, fully examining all relevant facts and rendering a decision that will best promote those goals. In this manner, NWI submits that the Court will better promote human rights in the workplace.

CONCLUSION

For the foregoing reasons, the National Workrights Institute takes no position on the merits of this case. There are many facts and factors to which NWI is not privy. Nevertheless, NWI encourages this Court to interpret the statute of limitations for anti-retaliation claims under the False Claims Act – and all other statutes of limitations – with an eye toward promoting their underlying goals of conceptual reasonableness, fairness, predictability, and a positive practical impact.

Respectfully submitted,

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